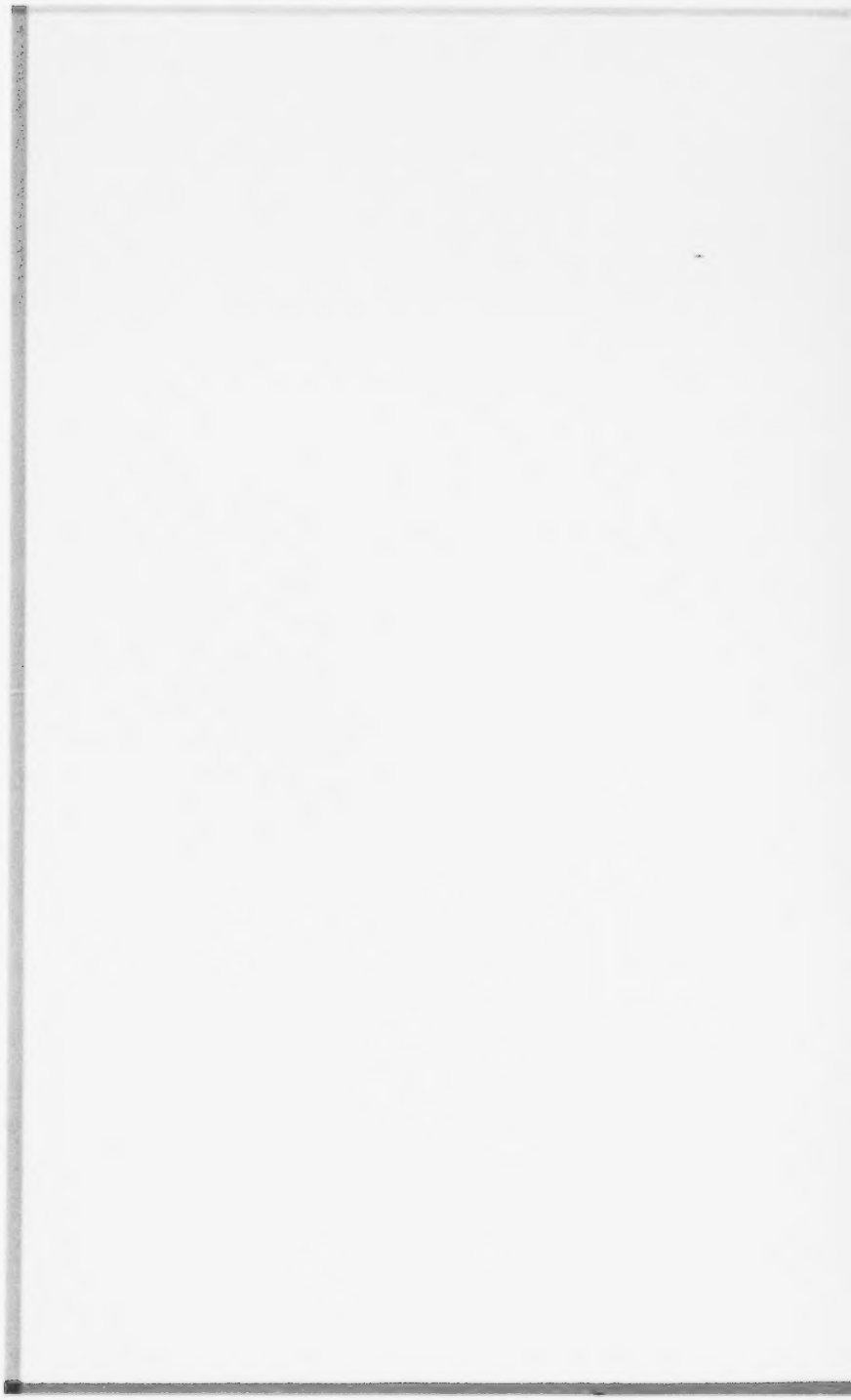

(10)

No. 1184

In the Supreme Court of the United States

October Term, 1941.

O. O. OWENS, *Petitioner,*

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Reply to Respondent's Brief in Opposition.

O. O. OWENS,
Petitioner,
Pro Se.

Tulsa, Okla.

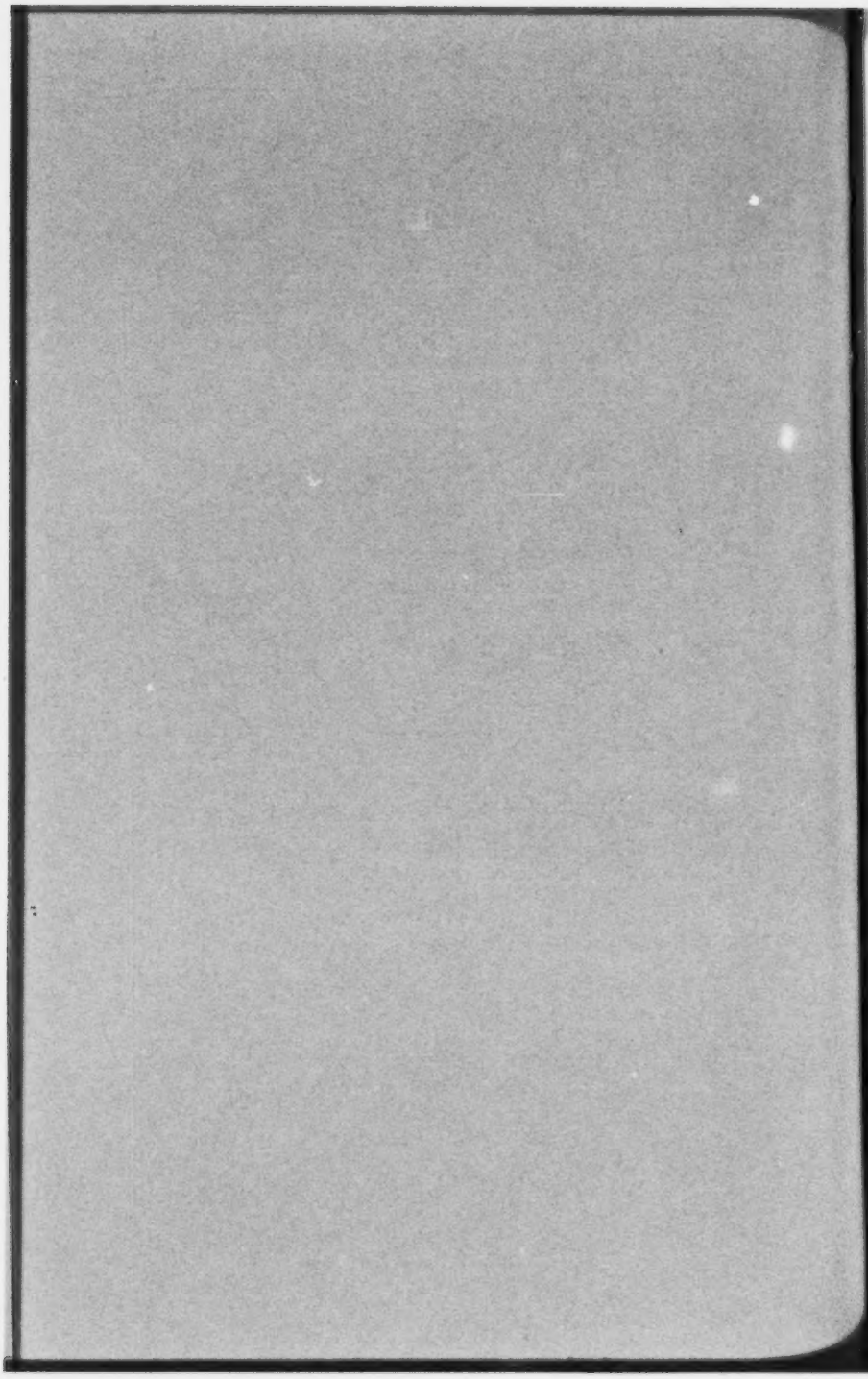

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TABLE OF CASES.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1941.

No. 1184

O. O. OWENS, *Petitioner,*

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION.

Explanatory Note.

Petitioner on this the 1st day of June, 1942, at 10 o'clock a. m., received a telegram from the Clerk of this Honorable Court stating:

> "Court has not passed on motion to defer consideration *Owens* case. Necessary your reply brief reach this office by June 5th."

Such requirement limits the consideration petitioner could otherwise give to Respondent's Brief in Opposition, which brief was received by petitioner on the afternoon of May 29th, 1942, and such restriction also limits the care in the preparation of this reply brief that should be and would otherwise be given by petitioner.

For convenience and time-saving, petitioner will follow the sequence of Respondent's Brief in Opposition.

Mis-statements by Respondent and Petitioner's Corrections and Explanations.

Respondent's "Questions Presented":

In respondent's brief, page 2, he states:

> "Specifically, the questions are—
>
> * * * * * * * *
>
> "*2.* Whether the item in question was in any event not deductible in 1920, *since it was paid in 1922* and since petitioner was on the cash basis of accounting.
>
> "*3.* Whether even if the petitioner kept his books on the accrual basis of accounting, the item was nevertheless not deductible in 1920, *since it did not accrue until 1921 or 1922.*" (Italics ours.)

The first quoted statement to the effect that the item in question "was paid in 1922" completely ignores and disregards the record, and is in direct conflict with the Board's Opinion (R. 478) wherein the Board explicitly defined the substance *of the December, 1920, contract with McKinney* as *"(which awarded additional moneys out of the impounded funds to Martha Jackson)."*

An "award" of additional moneys is so obviously a payment that no discussion and no supporting authorities for such an elementary proposition are required.

The second above quoted statement to the effect that the amount was not deductible "* * * since it did not accrue until 1921 or 1922" also conflicts with the record. In his brief (pp. 71-90, incl.) in support of Petition of Writ of *Certiorari*, petitioner demonstrated perfectly that the Board in its Opinion confused *payment* with *distribution; that the payment not only accrued but also was made by the December, 1920, contract in consequence of which such payment is de-*

ductible in 1920 on either the cash or accrual basis of accounting and reporting income; that the Receiver *paid* only his administration expenses; that he *distributed* to the owners thereof the residue of all impounded funds.

In his "Statement" respondent makes one correct statement or admission, *i. e.,* (respondent's brief, pp. 3 and 4) *"The facts out of which this controversy arose are complex."* (Italics ours.) Respondent's admission that the facts are complex more than justifies the lengthy petition and supporting brief filed by petitioner, in which petition the facts are correctly stated and in which brief the issues of fact and law are clearly explained and distinguished.

Unfortunately respondent, in his "Statement," relied only upon the Board's Memorandum Opinion *before the same was revised by Board Order entered November 30, 1940* (R. 522-523). In consequence thereof, respondent has mis-stated or misconstrued the facts, some of which errors should be called to this Honorable Court's attention.

On pages 4 and 5 of his brief respondent asserts:

> "Moreover, on July 9, 1917, one Parmenter, acting as the guardian of Martha Jackson, *contracted* with an agent of the petitioner and his associates *to convey her interest* in the land and impounded funds, in consideration of $12,000 cash plus 25 per cent of such of the impounded funds as should ultimately be adjudged to belong to her; * * *." (Italics ours.)

Respondent omits to say that Martha Jackson's guardian not only *contracted* to sell *but on the same day he sold and conveyed, in the manner provided by law and with the approval of the proper County Court,* Martha Jackson's unestablished, unadjudicated and contested claim *not only to the land but also to the then impounded funds and all funds accumulating thereafter.*

The above quoted statement was evidently intended by respondent to be construed with respondent's later statements about the construing contract of May 11, 1918, (Jt. Ex. A-1; R. 295-296, offered R. 186-187), and the Secretary's Order (Pet. Ex. 5; R. 314-316, offered R. 207), which statements coupled with the fact that a full-blood Indian was involved, was evidently intended by respondent to leave the impression with this Honorable Court that Parmenter's contract to sell Martha Jackson's "interest" was invalid or void without the Secretary's approval, in consequence of which *(according to respondent's theory)* petitioner never acquired title to the impounded funds until the transactions and all contracts relating thereto were approved by the Secretary, notwithstanding the final decree of a court of competent and exclusive jurisdiction rendered June 17, 1919.

Upon that theory, respondent apparently seeks to convey the impression that the Secretary's assertions that he had not approved the construing contract of May 11, 1918, *supra,* and the Secretary's demands upon the Black Panther Company for payment to Martha Jackson of royalty, constituted an adverse claim against petitioner's title to and his right to possession of his portion of the impounded funds, and that the removal of such adverse claim would require a capital investment and therefore not be deductible. This fallacy is exploded and demolished in its entirety by petitioners brief in support of his petition.

Respondent further states (Res. brief, p. 5):

> "On February 26, 1918, *petitioner and his associates transferred their interests* to the lessee oil company, which in turn assumed the obligation of the purchasers to Martha Jackson." (Italics ours.)

This statement is obviously wrong. Had "*petitioner and his*

associates transferred their interests'' on February 26, 1918, they would have entirely passed out of the transaction in 1918 and this tax controversy for the year 1920 would never have existed.

Respondent further states (Res. brief. p. 5):

> *''As a result of dissatisfaction* of the Department of the Interior with the contract of July 9, 1917, in respect of the amounts payable to Martha Jackson, the petitioner and his associates on May 11, 1918, entered into a supplemental contract which provided that she should receive $111,870.74 of the impounded royalties *plus one-eighth of the funds that should be accumulated thereafter.* (R. 471-472)'' (Italics ours.)

This statement does violence not only to the record but also to the Board's Opinion which respondent seeks to defend. The language in the Board's Opinion (R. 471-472) is as follows:

> "The Department of the Interior entertained the veiw that the contract of July 9, 1917, was *ambiguous and uncertain* as to the amounts Martha was to receive. Because of the intercession of representatives of the Department of the Interior in the Martha Jackson transaction, on May 11, 1918, Owens, Brazell and Johnson, acting through Kelly, their agent, and the Black Panther Co., entered into a supplemental contract with Parmenter, as guardian of Martha Jackson, *which construed the contract of July 9, 1917,* as provided that Martha Jackson should receive $111,870.74 of the impounded royalties *and in addition thereto one-eighth of the funds that should be accumulated by the receiver between March 31, 1918, and the date of the final determination of her interest by the District Court,* * * *."* (Italics ours.)

Respondent's inexcusable omission and mis-statement tends to create the impression that Martha Jackson should

receive a continuing royalty of one-eighth of the funds thereafter accumulated by the Receiver, *without limitation as to term*, whereas the Board's Opinion reads distinctly to the contrary, and the trial court's decree (Jt. Ex. B-2, R. 305, offered R. 187-188) expressly states: " * * * *plus 25% of one-eighth of the proceeds derived from said land between the 31st day of March, 1918, and this date,* * * * " —"this date" being the date of the decree, June 17, 1919.

Evidently respondent seeks to create the impression by his above quoted statement that the deduction here in controversy represented a portion of the amount due, *as a continuing royalty*, to Martha Jackson as "sole heir," and also *as a part of the consideration for the sale of her contested, unestablished and unadjudicated claim*,—and by so doing respondent attempts to make it appear that the payment was a part of the purchase price or cost of acquisition of a capital asset and therefore not deductible.

In his brief (p. 5) respondent states: "On June 17, 1919, the District Court entered a decree in which it adjudged that Martha Jackson was the 'sole heir' of Thlocco * * *," which statement is in direct conflict with the decree of the trial court (Jt. Ex. B-2, R. 297-309, offered R. 187-188), in which the words "sole heir" are not to be found. Other than this reference respondent gives no effect to such decree,—again demonstrating respondent's theory that the court determined that Martha was the "sole heir" of Thlocco, and as such and being a full-blood Indian, the Secretary could and did adjudicate her interest in the estate,—notwithstanding the other provision of the decree admitted by respondent.

Evidently respondent at this late date labors under and attempts to create the impression with this Honorable Court,

that Martha Jackson perforce was the "sole heir" of Barney Thlocco, otherwise she could not have participated in the transaction as she did,—and that she could act only with the approval of the Secretary,—and without such approval of her conveyance the final decree of the District Court was effective only to determine Thlocco's heirship.

In his brief (pp. 31-54) petitioner exhaustively demonstrated that the title to the Thlocco estate *was created in Martha Jackson, AS TRUSTEE, by settlements, compromises and purchases,* and that she received the amount agreed upon as consideration for the sale of her unestablished, unadjudicated and contested claim, and that she received nothing as a reserved interest; also that the payment here in controversy was made long after the final decree of a court of exclusive jurisdiction (which remained unappealed from), had quieted and perfected petitioner's title to and awarded him possession of the impounded funds, which were subsequently assigned, relinquished and transferred to Martha Jackson.

Respondent (brief, p. 6) further states: "Meanwhile, Saber Jackson attempted to intervene, * * * and Martha Jackson also attempted to intervene through another guardian * * *." Respondent omits to state that *Martha Jackson did not attempt to intervene,* but that McKinney, claiming through invalid appointment to be her guardian, sought to intervene but was denied leave and the right (Pet. Ex. 20, R. 632, 640, offered R. 278) *to get into the case,* in consequence of which the aforesaid decree remained final and undisturbed.

Respondent also omits to state that Parmenter, the legal guardian, not only recognized the decree rendered June 17, 1919, as being final and as properly adjudicating the amount

due Martha Jackson for the sale of her claim to the estate, but that in February, 1920,—prior to the time the Secretary entered his "judgment" and Order,—Parmenter commenced and thereafter successfully prosecuted his petition for writ of prohibition against McKinney and the County Court which made his pretended appointment as guardian of Martha (Pet. Ex. 20, R. 640, 641, offered R. 278) in consequence of which McKinney's attempt to intervene and to appeal were a nullity and created no claim adverse to petitioner's title to his portion of the impounded funds.

Respondent (brief, p. 6) further states:

> "*An appeal was taken from the rulings* of the District Court, and while that appeal was pending, the Secretary of the Interior promulgated an order setting forth that the contract of May 11, 1918, had not been approved by him or the Interior Department, and that Martha Jackson's interest in the impounded funds as of the date of her conveyance was equal to approximately $325,000.00. (R. 473)"

Again respondent avoids making a clear statement by not indicating who took the appeal and that the sole purpose of the appeal was for leave *to get into the case*, and unless and until such appeal had been decided in favor of McKinney in his pretended capacity as guardian (which it never was), neither his appeal nor that of Saber Jackson could possibly disturb the finality of the decree.

Respondent, in his statement above quoted, attempts to create the impression that the failure of the Secretary of the Interior to approve the contract of May 11, 1918, was a fatal defect and, as a consequence, an adverse claim against petitioner's title to the impounded funds was created by McKinney's and Saber Jackson's appeals, and continued to exist until March 25, 1922.

Petitioner, in his brief (pp. 32-54) in support of his Petition for Writ of *Certiorari*, demonstrated clearly and exhaustively that the Secretary's Order of May 6, 1920 (Pet. Ex. 5, R. 314-316, offered R. 207), was *void ab initio* and created no claim adverse to petitioner's title; that it was directed exclusively against the Black Panther Company, as the owner of the Martha Jackson lease executed in 1913 by Martha's guardian to J. Coody Johnson, which lease was subsequently assigned to the Black Panther Oil and Gas Company, and that company as lessee therein and owner thereof was exclusively liable for any royalty that might be due thereunder,—but that no title was conveyed by such lease and no oil or gas was ever produced thereunder, in consequence of which the Secretary's demands against the Black Panther Company were unenforcible had he had jurisdiction and authority to promulgate his order,—and still more important, that petitioner, having never owned or claimed an interest in said lease, could by no process of reasoning or by the most fantastic stretch of the imagination be liable for any royalty to Martha Jackson.

Furthermore, the very language of the order itself reveals that it was not intended by the Secretary to operate against petitioner, except to prevent distribution of any of the impounded funds until his demands for *payment* had been complied with by the Black Panther Company and his further demands in respect of *distribution* had been complied with by Martha's guardian.

The language of the Secretary's Order reads:

> " * * * that the said J. Coody Johnson, the Black Panther Oil and Gas Company, Saber Jackson, and all persons claiming by, through, or under them, or any of them, are conclusively estopped from denying that the said Martha Jackson is entitled to receive less than

> the full one-eighth royalty mentioned in the lease so executed by her guardian, * * * ."

Petitioner claimed nothing by, through or under J. Coody Johnson, the Black Panther Oil and Gas Company, Saber Jackson, or any other persons claiming by, through or under them. On the contrary, petitioner had relinquished the Saber Jackson claim *to the Black Panther Company;* he acquired nothing from the Black Panther Company nor from J. Coody Johnson, in consequence of which petitioner was not included within the intent and purpose of the Secretary's Order.

Again respondent (brief, p. 6) further states:

> "That order was promulgated May 6, 1920, and petitioner and his associates thereafter, on October 22, 1921, entered into *a further supplemental agreement* with Martha Jackson and the oil company whereby it was agreed that she should receive $308,000 of the impounded funds, an amount computed so as to comply with the order of the Secretary of the Interior. (R. 310-313, 473.)"

The statement, coupled with the preceding statement immediately above quoted, is obviously intended by respondent to create the impression that the Secretary, notwithstanding the final decree of a court of competent and exclusive jurisdiction, and notwithstanding that under the law the Secretary had no authority whatever to act in the premises, properly proceeded to adjudicate the matter and to determine Martha Jackson's "interest," and in so doing he created a claim adverse to petitioner's title, and that the cost of removing such purported claim would perforce be a capital investment and therefore not deductible. Petitioner's brief heretofore filed demonstrates the fallacy of respondent's theory.

However, respondent again *entirely ignores the December, 1920, contract with McKinney by which payment was made to Martha Jackson,* and ignores that part of the Board's Opinion (R. 478) in which the Board explicitly defined the substance of the December, 1920, contract as "*(which awarded additional moneys out of the impounded funds to Martha Jackson),*" and again (R. 479) where the Board in its Opinion held: "* * * there is no question that Martha Jackson could have claimed nothing under *the 1920 contract* * * *.*"

Moreover, respondent inadvertently admits the existence of such contract by his language "*a further supplemental agreement.*" A further supplemental agreement can only mean that a preceding supplemental agreement had been made. The record (Pet. Ex. 17, R. 337-340, offered R. 277) discloses that prior to May, 1921,—five months before execution of the Supplemental Contract of October 22, 1921, relied upon exclusively by respondent,—stipulations relating to a previously executed agreement had theretofore been filed in the Circuit Court, and *that pursuant to such prior agreement* (which was the contract of December, 1920) *and such stipulations* the attorneys for the contesting guardians stipulated, without the participation or approval of their guardian clients,

> "* * * that the sum of money agreed to be paid to the said Martha Jackson as per stipulation for settlement filed in the United States Circuit Court of Appeals for the Eighth Circuit, at St. Louis, Missouri, now impounded in the hands of the Receivers in the said cause, shall be paid by such Receivers to the Superintendent for the Five Civilized Tribes for supervision and disbursement under the rules and regulations of the Department of the Interior." (Pet. Ex. 17, R. 338-339, offered R. 277.)

Such exhibit, coupled with the Board's findings and conclusions (R. 478, 479), demonstrate beyond all possible doubt the existence, purpose, substance and effect of the December, 1920, contract with McKinney. Nevertheless respondent makes no mention whatever of such contract until the closing paragraph of his brief, reference to which comment will hereinafter be made.

Respondent's obvious purpose in omitting all comment about or reference to the December, 1920, contract is to make it appear that no agreement was made until October 22, 1921, in consequence of which the deduction here in controversy could not be claimed for the year 1920. In other words, respondent's position is that the payment was made in just any year except 1920.

Again respondent states (brief, p. 7): "*It was thus ordered that $308,000.00 be paid* out of the impounded funds for the use of Martha Jackson." Here again respondent assumes that *payment* was made by court order and not by contract,—and respondent confuses *payment* with *distribution* inasmuch as there had been unconditionally assigned, relinquished and transferred to Martha by the December, 1920, contract, a sufficient amount in excess of that due her under her valid sale contracts and the final decree to equal $308,000.00,—*and in addition thereto, she had been relieved of her one-eighth of the entire receivership administration expenses,*—no reference to which is made by respondent. The receiver *distributed* such money. He *paid* only his administration expenses.

Again respondent (brief, p. 7) emphasizes the Saber Jackson claim by stating: "On February 3, 1923, the Circuit Court of Appeals entered an order adjudicating the rights of Saber Jackson, * * *" but fails to correctly state

or admit that such order could not and did not in any manner affect petitioner because on October 7, 1918, (R. 199) petitioner and his associates had conveyed without warranty the Saber Jackson claim to the Black Panther Company in consideration of the performance by the Black Panther Company of the contract of February 26, 1918 (R. 197-199), in consequence of which nothing that Saber Jackson did and nothing that may have developed out of his attempt to intervene or to appeal could have adversely affected or did affect petitioner's portion of the impounded funds.

Respondent includes a footnote (on page 7 of his brief) directing this Honorable Court's attention to the case of *Saley* v. *Black Panther Oil & Gas Co.*, 280 Fed. 496 (C. C. A. 8th). Such footnote was evidently intended to create the impression that another adverse claim or contingency on petitioner's interest in, and portion of, the impounded funds existed. An examination of such opinion will reveal that Saley sought to intervene but was required to make a *prima facie* case upon her petition before the trial court would disturb the decree; that she failed and the trial court held that her claim was fraudulent and a fabrication in its entirety; that she was not the daughter of Barney Thlocco, but was the daughter of Chepan Taledege and as such had participated in Taledege's estate, in consequence of which the trial court refused not only to permit Saley *to get into the case* with her fraudulent claim, but also refused to disturb the decree. Certainly the denial of leave and the right to intervene, with a fraudulent claim, in a suit in which a final decree had been rendered could create no adverse claim to or contingency on the ownership of the estate, and we are at a loss to understand respondent's purpose in even referring to such matter.

Respondent (brief, p. 7) states:

> "The amount ($75,989.20) which petitioner seeks to deduct from his gross income for 1920 *represents his allocable share of the additional amount paid to Martha Jackson under the supplemental contract of October 22, 1921, which was ultimately approved.*"

Again respondent ignores the December, 1920, contract and refers exclusively to the contract of October 22, 1921, because the same was approved, still relying upon the theory that the Secretary of the Interior had jurisdiction in the matter, and ignoring the fact that regardless of the further fact that the McKinney contract was not approved by the Secretary of the Interior, Parmenter immediately asserted his right as legal guardian to administer such additional money; that he was estopped to assert the Secretary's demands (Pet. Ex. 20; R. 641, offered R. 278), but that after the contract had been made with McKinney and the money was unconditionally assigned, relinquished and transferred to Martha, Parmenter was not only in position, but it was his legal duty also, to assert his right to administer such additional money,—and he did so.

Furthermore, Parmenter vigorously and successfully prosecuted his petition for writ of prohibition against McKinney, and when McKinney was finally estopped from further interference with the administration of Martha's estate, for convenience in procedure a supplemental agreement (with Parmenter substituted therein for McKinney) was executed, so that the final decree of June 17, 1919, could be modified as demanded by the Secretary to provide that Martha's money,—not only that paid to her by the December, 1920, contract "(which awarded additional moneys out of the impounded funds to Martha Jackson)" (Board's findings, R. 478), but also the sum due her under her sale con-

tract and the court's final decree rendered June 17, 1919,—*could be distributed* to the Superintendent instead of, as the law required, to Parmenter, the legal guardian.

With McKinney prohibited, with Parmenter still the duly qualified and acting guardian of Martha and, after December 5, 1920, asserting his right to administer the "additional moneys awarded out of the impounded funds to Martha Jackson," and with Martha Jackson's sale contract and the construing contract of May 11, 1918, providing that the consideration for her unestablished and unadjudicated claim should be paid to her guardian, as the law required, and with the Secretary demanding that the decree be reformed to provide for *distribution* to the Superintendent instead of to Parmenter, obviously it was necessary to prepare another contract, with McKinney omitted and Parmenter substituted for him, to accomplish such purposes.

Furthermore, it was also necessary in order for petitioner and his associates and the Black Panther Company to protect themselves against any claims or demands by Parmenter, as Martha's legal guardian, which he might make as the result of Martha's money being distributed to the Superintendent instead of to Parmenter, to modify the construing contract of May 11, 1918, which situation and conditions clearly demonstrate the reasons for the provisions of the Supplemental Contract of October 22, 1921.

Respondent ignores the fact that *had the December, 1920, contract with McKinney not been made there would have been no basis for the Supplemental Contract of October 22, 1921.* McKinney had been prohibited by the Oklahoma Supreme Court in March, 1921. His petition for rehearing had been denied in September, 1921 (Pet. Ex. 20; R. 640, 641, offered R. 278). *Until he was prohibited McKinney was the only person who could assert the Secretary's demands. Mott*

v. *United States,* 283 U. S. 747, 51 S. Ct. 642, 75 L. ed. 1385. In McKinney's claimed capacity as guardian of Martha petitioner and his associates dealt with him and made the contract of December 5, 1920. By unconditionally assigning, relinquishing and transferring to Martha,—not to McKinney,—the additional money, Martha's estate was correspondingly larger, the Receiver held correspondingly more for her and less for petitioner and his associates, and Parmenter not only had, but asserted, his legal right to administer such money. Parmenter was the only person who could make an agreement, binding upon Martha Jackson, for her money to be *distributed* to the Superintendent, as demanded by the Secretary, instead of being *distributed* to Parmenter, as the law required. When the facts in this case are understood, respondent's position is immediately demonstrated to be wrong in its entirety.

Except for the fact that petitioner and his associates had, by the December, 1920, contract, with McKinney, unconditionally assigned, relinquished and transferred the additional money to Martha Jackson, it would have been an act of insanity to make the contract of October 22, 1921, because on that date McKinney was not in position, he having been prohibited, to assert the demands of the Secretary. The Secretary could not assert them *(Mott* v. *United States, supra),* neither could Parmenter, since he was estopped. Therefore it is patently clear that on October 22, 1921, when the supplemental contract (Jt. Ex. C-3; R. 310-314, offered R. 190) was made, the December, 1920, contract "(which awarded additional moneys out of the impounded funds to Martha Jackson)" (R. 478, 479) was in full force and effect, otherwise the Supplemental Contract of October 22, 1921,—the sole purpose of which was to provide for the modification of the decree to comply with the Secretary's demand *in respect*

of distribution to the Superintendent instead of to Parmenter,—would never have been executed because on that date there was no one to assert the Secretary's demands.

On page 7 of his brief respondent includes a second footnote referring to petitioner's computation. In printing the record in the Circuit Court, petitioner's computation was not printed in proper sequence in consequence of which it was not understandable. In his brief filed with the Circuit Court, petitioner included his corrected computation printed in proper sequence so that it would be easily understood. Such computation, with appropriate explanations, is included herewith as an appendix for the convenience of this Honorable Court.

On page 8 of his brief, respondent asserts:

> "The Board sustained the Commissioner's determination denying the deduction (R. 481), holding (1) that petitioner, who did not keep any regular books of account, was on the cash basis of accounting and could not deduct in 1920 any amounts in fact paid out in 1922; * * *."

Respondent does not admit what the record clearly shows, *viz:* that the Board's finding above referred to was based exclusively, *on the evidence given at the November, 1939, continued hearing* at Washington, and that such evidence *in respect of books, records and the method of keeping them,—(other than the single statement by petitioner that in 1920, he opened up and has since continuously kept a regular set of books),—was based exclusively on the testimony of the partners, W. E. Gayer and O. O. Owens, about the books and records of the partnership of Gayer & Owens for 1919 and prior years.*

Respondent fails to state or admit that the record con-

clusively shows that in the April, 1939, hearing at Tulsa, stipulations were made between the attorneys for petitioner and respondent which materially reduced the claimed deficiency. Logic and reason make clear that with a deficiency exceeding $36,000.00 for the year, 1920, in controversy, *at a hearing on the merits in April, 1939,* petitioner's books and records must have been exhibited, and scrutinized with exceeding care by respondent, otherwise respondent would not have admitted the deductibility of the second item claimed as a deduction in the original petition filed with the Board and two new or additional issues raised by petitioner at such April, 1939, hearing, which deductions were made by stipulation. (R. 164-165)

No issue was ever raised by respondent as to the sufficiency or correctness of the books and records kept by petitioner for the year, 1920. No evidence was offered by respondent that petitioner's books and records for 1920 were not complete, sufficient, proper and properly kept. On the contrary, the record reveals that in the hearing at Tulsa, Oklahoma, in *April, 1939,* petitioner's books for 1920 were specifically recognized and accepted by respondent as being regular, sufficient, proper and properly kept (R. 155-165), and that petitioner's *1920 books and records* offered at that hearing were accepted by respondent as establishing petitioner's contentions in respect of the deductibility of the second item or issue pleaded in his original petition and the two new or additional items, issues or transactions in 1920 not theretofore pleaded. Upon such proof, *established by petitioner's books,* such three items, totaling $13,211.18, were conceded by respondent to be deductible, and were by stipulation deducted. (R. 164-165)

The only allusion in this entire case to the character or lack of correctness, completeness or regularity of petition-

er's books and records for 1920 was made in the Memorandum Opinion of the Board. After first finding "petitioner, in 1920, filed an individual income tax return upon which was stated that petitioner either kept no books or that such books, if kept, were on a cash basis, * * *" the Board, after referring to the obviously erroneous statement on the face of petitioner's incomplete tentative returns as "an ambiguous answer," concluded that no "proper" books were kept by petitioner in 1920.

The Board first concluded:

> "But what has been established, in effect, is that no proper
> /books were kept. Therefore, under either conclusion, it appears that the respondent's contention must prevail. A taxpayer who keeps no books or records of account cannot be on an accrual basis. Cf. *John A. Brander,* 3 B. T. A. 231; *Sam Greengard,* 8 B. T. A. 734, affirmed 29 Fed. (2d) 502, and *Daniel Hecker,* 17 B. T. A. 874, petition for review denied by the Circuit Court of Appeals, 7th Circuit, April, 1931. There is no convincing proof to the contrary."

The Board's first conclusion, "But what has been established, in effect, is that *no* books were kept," so obviously referred to testimony relevant to the books and records of the partnership for 1919 and prior years, and was such a captious distinction between "books" and "records" that such conclusion was (by interlineation) revised to read: "But what has been established, in effect, is that no *proper* books were kept." (Emphasis ours.)

After making its first conclusion that *no* books were kept, the Board, by its later statement, "There is no convincing proof to the contrary," concluded the evidence relevant to *the partnership's books and records for 1919 and*

prior years was not sufficiently convincing to refute the obviously erroneous statement on the face of petitioner's incomplete tentative returns that petitioner was on the cash basis.

After first concluding that *no* books were kept, and citing a supporting authority for a simple proposition, the Board, by revising its opinion to recite that "no *proper* books were kept," and by not eliminating the cited supporting authority, indulged in self-destroying reasoning and statements.

An authority in support of the conclusion, "A taxpayer who keeps *no* books or records of account cannot be on an accrual basis," certainly cannot be considered in point and applicable to a conclusion that no *proper* books were kept, even though the conclusion was based upon evidence relevant to petitioner's books for 1920. But where such conclusion is based exclusively upon evidence relevant to the books and records of the partnership for 1919 and prior years, the conclusion is not only erroneous, but the cited authority is not in point, and both the conclusion and cited supporting authority are not applicable to the facts nor to the case presented.

With petitioner contending that his books were kept on the accrual basis and presenting new issues or items for deduction, and with his books and records for 1920 in evidence in the *April, 1939, hearing* to support such deductions, petitioner's contention that he was on the accrual basis for reporting his 1920 income must have been asserted and his books and contention must have been considered and approved before respondent conceded that the three items or transactions were deductible,—and which, when deducted (R. 164-165), reduced the claimed deficiency more than 20%.

The question of whether the petitioner's books and records for 1920 were regular, proper and properly kept having been disposed of in the *April, 1939, hearing* at Tulsa, by respondent's conceding the correctness of petitioner's contention in respect of the deductibility of the three issues, two of which were new issues (R. 164-165), there was no reason or occasion for such books or for further evidence about such books and records being offered *in the continued hearing in November, 1939, at Washington, D. C.,* inasmuch as the only issue to be heard by the Board at such November, 1939, continued hearing was the deductibility of the $75,-989.20 here in controversy.

Respondent exacted an agreement (R. 164, 476), as a condition to the hearing being continued from April, 1939, to the Washington calendar in November, 1939, that petitioner would raise no new issues. If petitioner's books for 1920 had not been approved by respondent as establishing the deductibility of the two new issues, there would have been no reason to require the agreement not to raise additional new issues,—*because without books for 1920, additional new issues could not be established*,—and the agreement about new issues would have been wholly unnecessary and, in fact, not thought of.

All the evidence in the record relating to books, records and method of keeping them (other than the single statement that in 1920 petitioner opened, and has since continuously kept, a regular set of books), was that given at the November, 1939, continued hearing at Washington, and related, exclusively, to the books and records of the partnership of Gayer & Owens for 1919 and prior years and to the method of keeping them.

That partnership had been dissolved in the latter part of 1919. Its old books and records had been lost or de-

stroyed. The evidence was offered for the purpose of showing that the income or profits of the partnership was determined by increase in net worth, which conformed, in fact, with the accrual basis of accounting; that the partners each reported, as their net taxable income, one-half the increase in net worth of the partnership; that petitioner, by having thus reported his income for 1919 and prior years on the accrual basis of accounting,— and having never sought from, or been granted leave by, respondent to change, was therefore, required to report his income for 1920 on the accrual basis and, in fact, did so, notwithstanding the obviously incorrect statement on the face of his incomplete tentative returns filed for 1920.

It was upon such evidence in respect of the books and records of the partnership for 1919 and prior years, that the Board concluded (R. 477): "It is the finding of the Board *that the 1920 return was not on the accrual basis.*" There fore, based upon the testimony in respect of the partnership's books and records for 1919 and prior years,—which books could not be offered in evidence after such great lapse of time,—the Board concluded (R. 478):

> "But what has been established, in effect is that no proper books were kept. * * * A taxpayer who keeps no books or records of account cannot be on an accrual basis. * * * No books of account are in evidence which would bear on petitioner's contention, and the records which were mentioned at the hearing, though not produced, do not give an indication that they were kept either as regular books of account or on an accrual basis."

Upon such facts, clearly revealed by the record, and upon the Board's oblique finding "that the 1920 return was not on the accrual basis," respondent bases his positive as-

sertion, "that petitioner, who did not keep any regular books of account, was on the cash basis of accounting and could not deduct in 1920 any amounts in fact paid out in 1922."

On page 8 respondent further asserts:

> "* * * and (2) that even if he were on the accrual basis, *his liability under the new agreement had not become definitely fixed until 1922* with the consequence that it could not be accrued in 1920. (R. 477-481)" (Italics ours.)

Petitioner, in his brief in support of his petition for Writ of *Certiorari* and hereinabove, has demonstrated that *the liability not only accrued, but payment was made, in 1920.* Thus the error in the Board's conclusion is self-evident.

However the Board's conclusion (R. 479):

> "To substantiate the contention of a loss on the accrual basis, it must be shown that the money became due from the taxpayer in the taxable year. So long as there remains a contingency as to its payment, it cannot be said to have definitely become due in that year. * * * In the facts of this proceeding it will be noted that Martha Jackson was to be paid only from the impounded funds. If it had been finally adjudged in 1922 that Martha Jackson's claim to the Thlocco grant was not valid, there is no question that Martha Jackson could have claimed nothing *under the 1920 contract* because there would have been no impounded funds from which Martha would have had a right to be paid. It is thus evident that throughout the years 1920 and 1921 and up until March 25, 1922, there was always a contingency on petitioner's assumed obligation. That contingency was that petitioner's claim to the funds, through Martha Jackson, be recognized as valid in the 1922 appeal." (Italics ours.)

is completely demonstrated on pages 85-88 of petitioner's

brief in support of his petition,—and by the court's decree, (Ex. B-2; R. 297-309, offered R. 187-188), which quieted and perfected petitioner's title to, and awarded him possession of, his portion of the impounded funds,—to be erroneous.

The 1922 appeal referred to can only be the appeal of McKinney from the trial court's order denying him leave or right to intervene,—to get into the case,—or the appeal of Saley from the trial court's order denying her leave to intervene,— to get into the case,—with her fraudulent claim. Since the trial court refused to permit either McKinney or Saley to intervene, and further refused to disturb the decree, the Board's confusion of the facts and the error in its conclusion,—"That contingency was that petitioner's claim to the funds, through Martha Jackson, be recognized as valid in the 1922 appeal"—is manifestly self-evident.

On page 8 respondent asserts:

> "The Circuit Court of Appeals affirmed upon still another ground, namely, *that in any event, such additional amount was at most expended in the acquisition of a capital asset and was therefore not deductible at all.*" (Italics ours.)

Such language is a decided elaboration upon, and strengthening of, the Circuit Court's conclusion. The Circuit Court held (R. 650):

> "It may be assumed, without deciding, that the order of the Secretary of the Interior fixing the amount due Martha was ineffective for want of authority to promulgate it. Still, the Secretary asserted the authority to promulgate it, and when it had been promulgated, petitioner and his associates elected to transfer, relinquish and assign to Martha a portion of the impounded funds *in order to adjust the matter and effectuate a distribution of the entire fund.* * * * But what ever may

have been the basis of the return, accrual or cash, the amount transferred, relinquished and assigned to Martha was a capital outlay and therefore was not deductible * * *." (Italics ours.)

In the instant case the expression "*to adjust the matter*" is a duplication of and means identically the same as the words "*effectuate a distribution,*" since effectuation of distribution of his impounded funds *was the only object sought by petitioner, and petitioner's only purpose in making such payment.*

Since the purpose "to adjust the matter" was identically the same as to "effectuate a distribution" in the instant case, it follows without argument that the matter to be adjusted was not the acquisition of a capital asset, or acquiring new property, the enlargement of an interest in, or the removal of an adverse claim to property already owned, but was solely for the purpose of expediting distribution of impounded income, title to which had been quieted and perfected by final decree, unappealed from, of a court of exclusive jurisdiction, and possession of which had been awarded by such decree, and the Circuit Court's conclusion is obviously erroneous.

In his brief in its entirety, petitioner demonstrated there was no adverse claim to or contingency on his portion of the impounded funds. Nowhere in the record can support be found for an assertion that petitioner acquired any additional or enlarged interest in the Thlocco Estate. On the contrary, his portion of the impounded funds was diminished by $75,989.20, and nothing in return was received therefor. No adverse claim was removed, no perfection of title resulted, no benefits were derived by petitioner, but only an absolute loss resulting from such payment was sustained by

petitioner. How then could petitioner have made a capital investment or "capital outlay" since he paid the amount in controversy to expedite distribution of earned income, with title thereto quieted and perfected and possession awarded by final decree, unappealed from?

Respondent's "Argument":

On page 8 in his "Argument," respondent asserts:

> "*1.* Assuming, arguendo, that the petitioner may be treated as having made the outlay in question, *it was plainly no more than a capital expenditure. It represented at most only additional consideration that was paid to acquire Martha Jackson's interest,* and was therefore not deductible at all." (Italics ours.)

Before the Circuit Court respondent asserted that the payment *was additional consideration for the land.* Here he asserts it was "additional consideration that was paid to acquire Martha Jackson's 'interest,' * * *." Interest is what? Martha had, in a lawful manner, sold and conveyed her unestablished, unadjudicated and contested claim to the estate. Pursuant to contracts title was subsequently created in her, *as trustee.* The final decree of a court of exclusive jurisdiction quieted and perfected that title so created, and awarded possession of the funds to petitioner and his associates.

The Secretary's demands were for *payment* of *royalty* and directed against the Black Panther Company, as lease owner, solely liable for any royalty that might be due thereunder if the lease had been valid and conveyed inherited title when executed. Petitioner had already acquired, in a lawful manner, Martha Jackson's claim and all her right, title and interest, if any, in and to the entire estate. With the Secretary's demands being directed against the Black Pan-

ther Company and intended to require that company to pay royalty to Martha Jackson out of that company's interest in the impounded funds, how could petitioner, for the sole purpose of expediting distribution of his portion of the impounded funds, be said to have paid "additional consideration * * *to acquire Martha Jackson's 'interest' * * *," in satisfying the demands of the Secretary directed against the Black Panther Company? The question answers itself.

A casual study of the record will disclose the object and purpose of the Secretary in promulgating his order. J. Coody Johnson, the attorney, had acquired the Jackson leases in 1913 as consideration for his services in attempting to establish Martha Jackson as the heir of Thlocco. If he failed he would, of course, get nothing, because the leases would be of no value (Ex. 20; R. 633, offered R. 278). Those leases had been assigned to the Black Panther Company.

It is obvious that the Secretary concluded that the Black Panther Company assumed Johnson's obligation; that inasmuch as the Black Panther Company had not been permitted to develop the property under the Jackson leases, but had availed itself of the opportunity of developing the property under the Receiver's lease and, in so doing, had paid a royalty of one-fourth to the Receiver;—and since petitioner and his associates retained only one-half the funds impounded by the Receiver at final distribution and a royalty thereafter of one-eighth, the Black Panther Company should be required to pay to Martha Jackson and to Saber Jackson such additional one-eighth royalty relinquished by petitioner and saved by that company, as provided by its contract (R. 197-199) with petitioner and his associates.

Therefore, it is perfectly clear that the purpose of the Secretary's Order was to require the Black Panther and Bay State Companies, as the owners of the Jackson leases,

to pay to Martha and Saber Jackson, to the dates of their respective sales July 9, 1917, and July 6, 1916, such additional one-eighth royalty, notwithstanding his purpose had no merit in law.

On pages 7 and 8 respondent asserts:

> "The decisions cited by the court below on this issue (R. 650-651) amply sustain its conclusion, and to those decisions may be added the following: *Brush-Moore Newspapers, Inc.*, v. *Commissioner*, 95 F. (2d) 900 (C. C. A. 6th), *certiorari* denied, 305 U. S. 615; *Colony Coal & Coke Corp.* v. *Commissioner*, 52 F. (2d) 923 (C. C. A. 4th); *Hutchings* v. *Burnet*, 58 F. (2d) 514 (App. D. C.); *Blackwell Oil & Gas Co.* v. *Commissioner*, 60 F. (2d) 257 (C. C. A. 10th); *J. I. Case Co.* v. *United States*, 32 F. Supp. 754 (C. Cls). There are no decisions to the contrary, notwithstanding petitioner's bald assertion that the decision herein is in conflict with the very cases relied upon by the court."

All the above cited cases, except *Blackwell Oil & Gas Co.* v. *Commissioner*, were cited by respondent in his brief filed in the Circuit Court in this case. Without exception, the cases of

> *Brush-Moore Newspapers, Inc.*, v. *Commissioner*, 95 F. (2d) 900 (C. C. A. 6th), *certiorari* denied, 305 U. S. 615;
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> *Colony Coal & Coke Corp.* v. *Commissioner*, 52 F. (2d) 923 (C. C. A. 4th);
>
> *Hutchings* v. *Burnet*, 58 F. (2d) 514 (App. D. C.); and
>
> *J. I. Case Co.* v. *United States*, 32 F. Supp. 754 (C. Cls.).

involve the acquisition, improvement or development of capital assets, and the claimed deductions were accordingly denied.

Such four cases fall in the same classification as the cases (except that of the *First National Bank in Wichita* v. *Commissioner,* (C. C. A. 10) 46 F. (2d) 283) cited by the court in support of its decision,—which cases were also cited by respondent in his brief filed in the Circuit Court.

In *Colony Coal & Coke Corp.* v. *Commissioner, supra,* at 52 F. (2d) 924, the court clearly defines a capital asset and enumerates the elements thereof. All such elements are absent from the instant case. Extremely significant is the court's language: "The taxpayer has acquired property of permanent value * * * ." No such condition exists in the instant case. Here the capital assets had been previously acquired, title thereto had been quieted and perfected, and possession of the impounded funds had been awarded, by final decree, unappealed from, of a court of exclusive jurisdiction.

The above cases cited by respondent and those cases (except *First National Bank in Wichita* v. *Commissioner, supra,),* cited by the court in support of its opinion (which were also cited by respondent in his brief filed in the Circuit Court) clearly involve the acquisition of a capital asset. Being such class of cases and in the instant case there being clearly no acquisition of a capital asset, it is obvious and clear, and accordingly petitioner reasserts with confidence his conviction that the cases cited by the court and also by respondent are in direct conflict with the decision of the Circuit Court in the instant case.

Expense sustained to acquire prompt distribution of impounded funds, title to which has been quieted and perfected, and possession thereof has been awarded, by final decree, unappealed from, of a court of exclusive jurisdiction is no different from a like expense incurred in removing a

squatter, unlawfully in possession of property, or expense incurred in removing a non-rent-paying tenant from property unquestionably owned by the landlord. The same question,—actual possession of the property or premises,—is involved in the instant case that would be involved in the hypothetical cases of removing a squatter or a non-rent-paying tenant. Respondent's Rules and Regulations provide, and all the cases on the subject hold, that in such instances expense incurred is deductible.

The case of *Blackwell Oil & Gas C.* v. *Commissioner,* 60 F. (2d) 257 (C. C. A. 10th), is the only case cited by respondent that even approaches, and it does not come close to, the instant case.

In the *Blackwell* case the taxpayer was denied deductions in two transactions. A part of one of the claimed deductions was so obviously a capital investment as to be self-demonstrative, but the balance of the claimed deduction, if identified as to amount, was properly an expense,—but since the part that was expense could not be identified by the record, the whole of the claimed deduction was denied.

The first issue in the *Blackwell* case involved a deduction claimed by the Blackwell Company in defending a suit for specific performance brought against the majority stockholders of the company who had signed an option to sell their stock. The brokers in the transaction sued ten of the directors and principal stockholders of the Blackwell Company and alleged that the defendants entered into a conspiracy and combination to prevent the carrying out of the option agreement and the consummation of the sale.

The board of directors of the company adopted a resolution in which they recited it was the duty of the company to pay the costs and expenses of such suit, and save the de-

fendants therein harmless from any judgments rendered and resolved that the company should pay all such costs and expenses and pay and satisfy any judgment. Thereafter the parties to such action compromised the same by the payment to the plaintiffs of a substantial sum of money, and in 1923 the company paid such amount in full settlement of such suit.

The Tenth Circuit Court sustained the denial of the deduction on the ground, *first,* that the cause of action was predicated upon an alleged conspiracy to which the corporation was not a party; that the plaintiffs charged that a conspiracy existed, which if true was unlawful, and the deduction was denied on the ground that the directors, as such, of the company had no authority to enter into an unlawful conspiracy, and *second,* that the amount paid by the company in the compromise was neither an ordinary or necessary expense of the corporation.

In his brief petitioner demonstrated that the deduction here in controversy was an ordinary and necessary expense made in the course of this business and solely to expedite distribution of his impounded income in order that such income might be used in the future conduct and operation of petitioner's business, and further, to avoid the loss of the use in his business of such impounded income, and also to avoid the exepense and loss of the use of such income pending a long drawn-out lawsuit, between other parties (Parmenter and the Secretary), groundless in law, but which would have continued for a long time because of the amount involved.

On page 9 respondent further asserts:

> "*2.* Moreover, the Board found that petitioner was on the cash basis of accounting and that he did not keep

any regular books on the accrual basis. (R. 478) *The record fully justifies that conclusion.* Accordingly, since the amount in question was not paid to Martha Jackson until 1922, it could not be deducted in 1920 by one on the cash basis." (Italics ours.)

Respondent's assertion that "The record fully justifies that conclusion" has hereinabove been sufficiently refuted. His further statement, "Accordingly, since the amount in question was not paid to Martha Jackson until 1922 * * *" has, in petitioner's brief in support of his petition and herein, been demonstrated to be based upon a confusion of *payment* with *distribution;* that the money was *paid* by the December, 1920, contract with McKinney, and that after petitioner and his associates, by the December, 1920, contract, unconditionally assigned, relinquished and transferred to Martha Jackson such additional money, the Receiver held more in trust for her and less in trust for petitioner and his associates until 1922, when the Receiver, as one trustee, *distributed* to the Superintendent, as another trustee for Martha, instead of to Parmenter, her legal guardian, the money not only assigned, relinquished and transferred by the December, 1920, contract, but also the money due her under her valid sale contract and the final decree of the District Court; that pending the controversy between the Secretary, McKinney and Parmenter, subsequently narrowed to a controversy between the Secretary and Parmenter, the Receiver, as Martha Jackson's trustee, held such additional money as securely and safely in trust for her as it could have been held by either Parmenter or the Superintendent.

On page 9 of his brief, respondent asserts:

"*3.* Finally, even if the amount were otherwise deductible and even if petitioner were on the accrual basis, the item did not accrue in 1920. Petitioner claims that

the contract giving rise to that additional liability was executed on December 5, 1920. (Pet. 19, Br. 27, 31, 61, 69-89.) *But that contract was entered into with one McKinney, an alleged guardian of Martha Jackson, and was not the contract which formed the basis for the 1922 judgment.* (R. 279, 283, 285) The contract which formed the basis for the judgment was entered into with Martha Jackson's duly appointed guardian, Parmenter, and was executed on October 22, 1921. (R. 310-313) Accordingly, even if petitioner were on the accrual basis, the liability in question could not have accrued prior to 1921. Petitioner is therefore not entitled to any deduction for 1920." (Italics ours.)

That such argument is self-destroying reasoning has been fully demonstrated herein and also in petitioner's brief in support of his petition. That Martha Jackson was paid the additional money is conceded. The fact that McKinney's contract was not approved by the Secretary has been demonstrated to be immaterial since the Secretary had no jurisdiction to approve it. The fact that McKinney was the only man who could assert the Secretary's demands for *payment*, and the further fact that Martha Jackson got the full benefit of the December, 1920, contract, and that Parmenter, the legal guardian, immediately asserted his right to administer the additional money assigned, relinquished and transferred by the December, 1920, contract with McKinney, is the material, pivotal and decisive point in this case.

Such argument conclusively demonstrates respondent's desperation and his eagerness to utilize any unstable basis for support of his claims and assertions, demonstrated to be both groundless in fact and law in the instant case.

Conclusion.

The fact that the facts in this case are complex, as admitted by respondent, did not justify respondent in the first instance in "guessing off" the issues herein and by "playing safe" to determine a ruinous deficiency against petitioner. The complexity of the facts does not justify the Board's decision based upon confusion of the facts and confusion of *payment* with *distribution.*

Such complex facts do not justify the Circuit Court's decision that the payment in controversy was a "capital outlay" or a capital investment where the record conclusively shows that petitioner acquired no new, or enlarged interest in, property, nor removed an adverse claim to property already owned,—but on the contrary, petitioner's interest was diminished as a result of such payment, and from which no benefits whatever were derived by petitioner, in consequence of which the transaction contained none of the elements of a "capital outlay" or capital investment.

Respectfully submitted,

O. O. Owens,
Petitioner,
Pro Se.